APPENDIX A

INSTRUMENT CANCELLING DR. GEORGE OSER'S VOTER REGISTRATION FOR 1967, EXECUTED BY CARL SMITH, HARRIS COUNTY VOTER REGISTRAR, DATED NOVEMBER 22, 1967. FILED AMONG THE PAPERS.

Since the Court of Civil Appeals has refused the writ of mandamus and apparently does not have jurisdiction;

And further since the Election Code puts the responsibility squarely upon the shoulders of the Voter Registrar to make a decision;

And since time is of the essence that I make a decision so that any or all parties to the controversy may appeal to the District Court, as provided for in Article 5.17a, Section 2, of the Election Code;

And since there is adequate relief through such an appeal, I have decided to make a determination as to the legality of the registration of Dr. George T. Oser.

After listening to all of the evidence presented by all parties concerned;

And the further fact that Dr. Oser was advised several days prior to the printing of the ballots in the first election of the fact that his voter registration was in question and would probably be challenged;

I find that I have no alternative except to rule as follows:

The registration of Dr. George T. Oser is hereby canceled.

Since Article 5.17a, Section 2, provides that either party to the controversy may appeal from my decision within 30 days, I would assume that Dr. Oser through his Attorney will do so.

Article 5.17a, Section 2, provides that the District Court is to hear any appeals from my decision. I am making my decision today in order that sufficient time will be provided the parties for an appeal prior to the printing of the ballots.

I am informed that ballots will not be printed until Monday, and I am also informed that the District Courts will be available all day Friday.

Chief Election Officer John Hill has ruled that any registrations after midnight, January 31, 1967, of persons who were residents of the State of Texas on the first day of the registration period are erroneous and that the Voter Registrar had no authority to register such persons.

Therefore Dr. George Oser's Registration for 1967 is Cancelled.

CARL S. SMITH,
Harris County Voter Registrar

November 22, 1967

JUDGMENT NUNC PRO TUNC OF THE 164th JUDICIAL DISTRICT COURT, DATED JANUARY 3, 1968. ENTERED: Volume 519, Page 553, General Minutes District & Domestic Relations Courts, in and for Harris County, Texas. ALSO NOTICE OF APPEAL GIVEN.

NO. 750,608

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
164TH JUDICIAL DISTRICT

GEORGE OSER, Plaintiff

v.

CARL S. SMITH,
HARRIS COUNTY VOTER REGISTRAR, Defendant

GEORGE POLK and SAM LUCARIO, Challengers

On this the 24th day of November, 1967, came on to be heard the above entitled and numbered cause, and came Plaintiff, George Oser, in person and by his counsel of record, Raeburn Norris, Al Schulman and James L. Hippard, and announced ready with reference to plaintiff's appeal from the decision of the Harris County Voter Registrar, Carl Smith, cancelling Plaintiff's 1967 Voter Registration Certificate, the said Registrar also appearing in person and announced ready, and came said Challenger, George Polk, in person and by his counsel of record, Fred W. Moore, and stated in open court that he was not ready and that he had not had an opportunity

to prepare the pleadings he desired and asked for a continuance, whereupon the Court directed said Challenger Polk to apply to the presiding district judge, the Honorable Lewis Dickson, for such continuance which was done, but Challengers' request for continuance was denied, to which denial the Challenger excepted in open court, whereupon the Judge of this Court announced that he would proceed to trial inasmuch as an election was imminent, being called for December 5, 1967, and this Court directed all parties proceed to trial which was done and all said parties participated therein, except Sam Lucario who appeared only as a witness; and

After duly considering the pleadings, that is Plaintiff's appeal, the challenge filed by the said George Polk before the said Carl Smith, his decision and the evidence offered by all parties and the argument of counsel, this Court finds that George Oser, Plaintiff, did not properly register and did not diligently comply with the means available to him to register in accordance with the law prior to the 1967 election held by the School Board of the Houston Independent School District and that the decision of said Registrar, Carl Smith, was correct and that said appeal should be denied.

It is THEREFORE, ORDERED, ADJUDGED AND DECREED that the appeal of George Oser, Plaintiff, is hereby denied and the decision of Carl Smith, Harris County Voter Registrar, Defendant, is hereby affirmed and Plaintiff's 1967 Voter Registration Certificate is hereby cancelled to which ruling of this Court plaintiff excepted and gave notice of appeal.

Signed and entered nunc pro tunc this 3rd day of January, 1968.

JOHN R. COMPTON
Judge

APPROVED:

_____

Attorney for Challenger
George Polk

APPROVED AS TO FORM ONLY:

Raeburn Norris
Al Schulman,
James L. Hippard

By AL SCHULMAN
Attorneys for Plaintiff

APPENDIX B

U. S. Constitution, Amendment XIV, Section I:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Revised Civil Statutes, art. 5.10a (effective Oct. 1, 1966)

> *Persons entitled to register*
>
> Every person who at the time of applying for registration is in other respects a qualified elector, or who will become a qualified elector within one year from the first day of March following the date of his application for registration, shall be entitled to register as a voter of the precinct in which he resides; provided, however, that no person shall be entitled to vote at any election unless he is a qualified elector on the date of the election. The registration certificate of a person who registers before he becomes a qualified elector shall have stamped or written thereon the following: "Not entitled to vote before _____" (date on which he will become a qualified elector to be inserted in the blank), and this notation shall also be placed opposite his name on the list of registered voters.

Texas Revised Civil Statutes, art. 5.11a (effective Oct. 1, 1966)

Annual registration; period for registration; period for which registration is effective

Voters shall register annually. The first period for registration under this law shall begin in each county immediately upon the effective date of this Section and shall end on the thirty-first day of January following; provided, however, that if this Section takes effect after January 1, 1967, as the result of a court decision, the registration period shall continue through the thirtieth day following the effective date. In each year thereafter, the period for registration shall be from the first day of October through the thirty-first day of January following. The first registration hereunder shall entitle the registrant, if otherwise qualified, to vote at elections held between the first day of February following the registration period and the last day of February of the following year. Each annual registration thereafter shall entitle the registrant, if otherwise qualified, to vote at elections held during the period of one year beginning on the first day of March following the registration period.

Texas Revised Civil Statutes, art. 5.12a (effective June 12, 1967)

Registration by . . . new residents

Subdivision 2. New Residents. Any person who was not a resident of the state on the first day of the regular registration period but who becomes a resident before the beginning date of a voting year may register for that voting year at any time after he becomes a resident and up to thirty days before the end of the voting year, if at the time of applying for registration he is a qualified elector or will become a qualified elector before the end of the voting year.

Texas Revised Civil Statutes, art. 5.17 (repealed effective Feb. 1, 1967)

Certificates of exemption based on nonage and nonresidence

As a condition to voting, any person who is in other respects a qualified voter and who is exempt from the payment of a poll tax by reason of the fact that he had not yet reached the age of twenty-one (21) years or was not a resident of this State on the first day of January preceding its levy, must have obtained from the tax collector of the county of his residence a certificate of exemption from the payment of a poll tax not later than thirty (30) days before any election at which he wishes to vote; provided, however, that a person who obtains an exemption certificate at any time before the first day of February for use during the ensuing voting year may vote at any election held after the beginning of the voting year if he is otherwise eligible to vote at the time of the election. No such person who has failed or refused to obtain such certificate of exemption shall be allowed to vote.

. . .

An exempt person who applies for a certificate as prescribed by this Section between the dates of October 1st and January 1st following shall be issued a certificate for use during the remainder of the current voting year (the voting year being from February 1st through January 31st) if he is then a qualified elector or will become a qualified elector before the expiration of that voting year, and shall also be issued a certificate for use during the ensuing voting year if he will be entitled to vote without payment of a poll tax during the ensuing year. On applications received between the dates of January 2nd and January 31st following, the tax collector shall issue the applicant

an exemption certificate for use during the ensuing voting year if he will be a qualified elector entitled to vote without payment of a poll tax at any time during the ensuing year. On applications received between the dates of February 1st and September 30th following, the tax collector shall issue the applicant an exemption certificate for use during the current voting year if he is then a qualified elector or will become a qualified elector before the end of that voting year.

. . .

Texas Revised Civil Statutes, art. 5.17a (effective Oct. 1, 1966)

Subdivision 2. Challenge of registered voter. Any registered voter shall have the right to challenge the registration of any other registered voter in his county by filing with the registrar of voters a sworn statement setting out the grounds for such challenge. The registrar shall give notice to the person whose registration has been challenged, and a hearing shall be held and a ruling made thereon. Either party to the controversy may appeal from the decision of the registrar to a district court of the county of registration within thirty days after the registrar's decision, and the decision of the district court shall be final. A challenged voter may continue to vote until a final decision is made canceling his registration.

BRIEF IN OPPOSI-TION TO PETITION FOR A WRIT OF CERTIORARI

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FILED
MAR 28 1968
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1198

GEORGE OSER,
Petitioner,

vs.

CARL S. SMITH, REGISTRAR,
Respondent.

BRIEF OF CHALLENGER GEORGE POLK IN REPLY TO PETITION FOR WRIT OF CERTIORARI

FRED W. MOORE
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IN THE

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Respondent.

BRIEF OF CHALLENGER GEORGE POLK IN REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

NOW COMES Challenger, George Polk, and respectfully files this his brief in reply to the petition for writ of certiorari of George Oser.

JURISDICTION

There is no sufficient allegation of jurisdiction in the petition. This controversy has dwindled to a mere mental exercise involving the abstract question as to whether or not George Oser was properly registered in 1967 when he attempted to run for a position on the School Board for the

Houston Independent School District. Petitioner claims that this Court has jurisdiction under 28 USCA §1257(3) but the alleged existence of a Federal question was not raised until after the entry of the final judgment in this cause by the District Court of Harris County, Texas. Petitioner's appeal is pending in the Court of Civil Appeals for the First Supreme Judicial District of Texas in Houston. No Texas appellate court has considered this question, although Petitioner has his appeal filed in the Texas appellate court indicated.

The first pleading filed in the District Court of Harris County, Texas, raising any Federal question was Petitioner George Oser's reply to Challenger George Polk's motion to strike Oser's request for findings of fact and conclusions of law which obviously were requested after the entry of the final judgment, which was signed and originally entered December 4, 1967. Thereafter Petitioner's counsel filed a motion for nunc pro tunc entry of a judgment because the original decree entered failed to contain a notice of appeal. Judge Compton, acting for Judge Cunningham, on January 3, 1968, entered a nunc pro tunc judgment January 3, 1968. No alleged invalidity of a treaty or statute of the United States is involved, nor is the validity of any state statute drawn in question as required by §1257, 28 USCA, Subdivision (3).

In said reply of Petitioner George Oser filed after judgment in the trial court, he stated that an appeal is permitted, directly to the Supreme Court of the United States, because Art. 5.178(2) VACS infringes Federally protected rights. If Petitioner has that right of appeal, he has not exercised same, but on the contrary has filed a petition for writ of certiorari.

Oser is not a Negro and the record does not disclose any violation of his civil rights. If the Texas Voter Registration Law is in conflict with the Fifth and Fourteenth Amendments of the Constitution, there is no allegation in Oser's pleadings filed in the trial court as to how the conflict arises, or what are the provisions of the State statutes and said amendments that conflict or how they conflict. We submit the alleged jurisdiction of this Court does not exist with reference to this case.

QUESTIONS PRESENTED

There are two questions presented by Oser with reference to the merits and likewise two questions concerning procedure as follows:

I.

At the request of Petitioner, Judge Warren P. Cunningham of the trial court filed findings of fact and conclusions of law. He did not accept the drafts of either Petitioner or this Challenger, but wrote such findings himself. A copy is attached hereto marked Appendix A. If the Judge's findings of fact to the effect that George Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period between October 1, 1966 and January 31, 1967, and that he did not apply for registration as a voter during such period, is supported by any evidence, then there is no merit to Petitioner's contentions unless the state statutes complained of are unconstitutional as a matter of law. The trial court recognized said statutes and found that he had jurisdiction of the parties and subject matter and set forth his conclusions of law in addition to his findings of fact. No sufficient basis has been pled for holding such statutes invalid on their face as a matter of law. Under the facts as found by the trial

judge which are amply supported by the evidence, Oser's petition should be dismissed

II.

The matters complained of by Oser are moot. The registration certificate which he held was for the year 1967. That year has passed. The election has been held. The School Board is functioning. Oser did not attempt to take advantage of any remedies available to him, such as injunction. He did not sue for damages. He simply asks this Court to decide the abstract question as to whether his registration in 1967 was valid or invalid. Under the authorities, this Court should not consider such abstract question at this time.

III.

The first procedural question involved is whether or not Oser has the right to a writ of certiorari concerning the constitutional questions alleged by him when he did not raise such constitutional questions until after the trial court had decided the controversy and rendered the judgment. The only pleading filed by Oser referring to the constitutional questions now asserted by him is George Oser's reply to Challenger George Polk's motion to strike Oser's request for findings of fact and conclusions of law. Such proceedings occurred after the entry of final judgment. Oser should not be allowed at this time to present to this Court a claim asserted for the first time after the entry of final judgment. Oser chose to apply to this Court for writ of certiorari. Under the Texas decisions, the raising of these questions for the first time in connection with this petition for certiorari is too late. This question also involves jurisdiction. He should have raised those questions in the trial court and although he has an appeal pending in the

Court of Civil Appeals, such questions have never been passed upon by any Texas appellate court. His petition for writ of certiorari should therefore be denied.

IV.

The second procedural question is whether Oser has exhausted his remedies in the Texas courts. We do contend that he has no right of appeal under the Texas statutes. He has chosen, however, to ignore that provision of the Texas statutes and has perfected an appeal. Until a Texas appellate court of final jurisdiction has ruled on his appeal, we contend he has no standing in this Court with reference to the matters asserted in his petition for certiorari. If our contentions as to this question are correct, then this Court has no jurisdiction of this suit.

ARGUMENT AND AUTHORITIES CONCERNING PROCEDURAL QUESTIONS III AND IV WHICH ALSO PERTAIN TO JURISDICTION

In *Jackson* v. *State*, 280 S.W. 202 (Tex.Cr.A. 1925) cert. den. 46 S. Ct. 474, the Court of Criminal Appeals of Texas, which is the highest court of this State with reference to criminal matters, held:

> "A necessary predicate to invoke federal review is that the state court has been first given opportunity to pass on the question as to whether there was involved in the particular matter any federal question. Coffee v. Groover, 123 U.S. 1, 8 S. Ct. 1, 31 L. Ed. 51; Illinois Cent. R. v. Mulberry Coal Co., 238 U.S. 275, 35 S. Ct. 760, 59 L. Ed. 1306; Cincinnati, etc., Ry. Co. v. Slade, 216 U.S. 78, 30 S. Ct. 230, 54 L. Ed. 390; Winona, etc., Land Co. v. Minnesota, 159 U.S. 540, 16 S. Ct. 88, 40 L. Ed. 252; Bolln v. Nebraska, 176 U.S. 83, 20 S. Ct. 287, 44 L. Ed. 382; Erie Ry. Co. v. Purdy, 185 U.S. 148, 22 S. Ct. 605, 46 L. Ed. 847. This is always true when

required under the practice of the particular state. Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812." (p. 208)

The decision styled *In re Lamkin,* 78 S. Ct. 137, 355 U.S. 59, reh. den. 355 U.S. 908 (1957), decided by this Court, denied a petition for writ of certiorari because the decision of the state courts was found to rest on adequate state ground, the petitioner having failed to comply with applicable state procedures.

In *State* v. *Humble Oil & Refining Co.,* 194 S.W.2d 811 (1946 nwh), the court held that the Federal question was raised for the first time in the motion for rehearing in the Supreme Court of Texas, which the court held was too late and therefore was waived by the applicants. The court said in that opinion:

> "After this case left the District Court, a Federal question was raised for the first time, and that was in their motion for rehearing in the Supreme Court of this state, after that court had refused their application for writ of error for want of merit.
>
> "And I certify that under the Texas Practice, any Federal question that might have been in the case was not raised in time to be considered, and therefore was waived by the applicants." (p. 812)

In *Cox* v. *State of Texas,* 26 S. Ct. 671, 202 U.S. 446, 50 L. Ed. 109, it was held that a Federal question although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court where it does not appear the state court dealt with the question. See also *Waters-Pierce Oil Co.* v. *State of Texas,* 29 S. Ct. 227, 212 U.S. 112.

One of the statutes in question, Subdivision 2 of Article 5.17a Texas Election Code VACS (Petitioner's Appen-

dix B, p. 9a), provides that an appeal may be had from the decision of the Registrar, with reference to a challenge of any registration, to the District Court within thirty days after the Registrar's decision and that the decision of the District Court shall be final.

No state appellate court, however, has passed on the question of the finality of the District Court's decision and there is no necessity to pass on it here because the constitutional questions which are now raised with reference to said statute were not raised in the trial court. Furthermore, Petitioner has chosen to ignore the provision (no appeal from District Court) just mentioned and has perfected an appeal involving the subject matter of this case to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston and said appeal is now pending there. It is our view that the Texas appellate court mentioned will dismiss the appeal because the matter is moot under the great weight of authority as we shall hereinafter point out but no ruling has been made. No appeal has been denied because of said provision of the Texas Election Code by any court within our knowledge.

If it were denied, we believe it would be a valid denial but that question is not before this Court.

ARGUMENT AND AUTHORITIES UNDER QUESTION I ABOVE

On December 18, 1967, the trial court held a hearing concerning findings of fact and conclusions of law which ended by the Court preparing his own findings of fact and conclusions of law and signing same December 20, 1967. The court had previously entered his judgment signing same December 4, 1967. A copy is attached hereto marked Appendix B; it contained no notice of appeal. Conse-

quently, after a hearing held January 3, 1968, Judge Compton in lieu of Judge Cunningham, entered a nunc pro tunc judgment containing said notice of appeal; otherwise the judgments are the same. Subsequent to the decree as stated, that is December 20, 1967, Judge Cunningham stated in his findings of fact that the plaintiff George Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period of October 1, 1966 through January 31, 1967 and that he did not apply for registration as a voter during such period. The evidence supporting this finding is substantial. There is no evidence against it.

Both Dr. Oser and his wife testified. Part of Dr. Oser's previous verified testimony before Mr. Smith was likewise introduced without objection.

Oser testified that his wife did not apply to register for him but on the contrary she called the office of the registrar for information for him (SF 17)* and stated she asked if they could come down and register. She further testified that she did not appear before Mr. Smith or anyone in his office and asked for permission to register and that she did not attempt to register for herself, but on the contrary called to see if they both could come down to register (SF 17).

She stated her first inquiry was made in October of 1966 and that in January, 1967, she testified that she made another telephone inquiry following the same procedure (SF 18). He received his certificate of registration in July, 1967.

He paid no poll tax of any kind during this period (SF 19) and he personally did not talk to anyone about register-

*The abbreviation "SF" as used in this brief means Statement of Facts included as a part of the record filed herein.

ing during the period running from October 1, 1966 through January 31, 1967 (SF 20).

In response to inquiry made to Mr. Smith, the Registrar, Dr. Oser testified that he was not told that he could not register but on the contrary his wife was told to call back in January (SF 21).

About October 26, 1967, Mr. Oser was advised by an employee of the Registrar, Mr. Grigsby, that Oser's registration was not proper (SF 22). Challenges by Polk and Lucario were filed.

Mr. Smith did not immediately find that Mr. Oser was improperly registered but on the contrary he called a discussion or hearing with reference to the matter on November 16, 1967 (SF 31). He made no ruling at that time but set another hearing for November 22, 1967.

Mr. Smith wrote the Secretary of State, John Hill at Austin, asking his opinion with reference to Oser's registration (see Exhibit C-3). The Secretary of State replied that if the new residents came to Texas before October 1, 1966 and applied for registration after January 31, 1967, they were registered erroneously. Mr. Hill, in his letter to Mr. Smith of November 13, 1967 (Exhibit C-4) quoted Article 5.10a of the Texas Election Code.

Mr. Smith, the Registrar, did not concede that the Osers were erroneously turned down (SF 37). He said it was possible and there were forty some odd persons similarly situated (SF 37). At one time he said about forty-five (SF 42). He also testified, however, that his office registered several thousand new residents during the proper time, that is between October 1, 1966 and January 31, 1967 (SF 39). Smith testified that his office registered 3,803 such new residents during said period from October

1, 1966 to January 31, 1967 (SF 47, 81). Smith further testified that he never refused to register Dr. Oser (SF 44) and that no one in his office ever reported any such telephone conversation testified to by Mrs. Oser (SF 45).

This Court should not take jurisdiction of a claim of this kind when the Petitioner made no personal request but on the contrary produced his wife who testified she made some telephoned inquiries.

Oser was fully aware before the election that his registration was being questioned (SF 46). He did participate in the initial election but he did not participate in the runoff.

Petitioner attached to his petition filed in the District Court a copy of an opinion from the State Attorney General rendered July 22, 1952 (Exhibit C). That opinion has no relevance here. It pertains to an ancient and outmoded set of election laws. Oser was not barred from registering because of the failure of the county authorities to provide and issue him a certificate but on the contrary because he did not qualify for registration and made no attempt to do so. Smith testified that his office received several thousand telephone calls every day (SF 47) and that during the period in question, that is certainly during the last month, January, 1967, there was an active campaign on the part of many agencies to bring about a high registration of voters and that application blanks were published daily in the Houston newspapers during all of January, 1967 and that he, Smith, estimated that such publication of blank applications amounted to several million (SF 78).

After Mr. Smith testified about the million or more said application blanks printed in the various newspapers in Houston which could be cut out, filled in, signed and

mailed in, Mrs. Oser took the witness stand and testified she had not seen any voter registration application forms in any newspaper but that after learning about the applications, she attempted to find them. When she was unable to find one in the newspaper that she had in her house, she called down to the tax office to see if she could get one (SF 86). She did not testify as to the result of that inquiry (SF 86, 87).

Mr. Smith testified that the Houston Post, the Houston Chronicle and other newspapers published these applications during the month of January, 1967; that his office maintained employees to man telephones to take all applications and mail applications to people that asked for them (SF 81). He also testified that his computer found that they had registered 3,803 new registrations during the proper period but he had not determined how many of them came through newspapers (SF 81, 82).

Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, p. 525, sets out the rule that findings of fact may not be set aside unless clearly erroneous as follows:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo." (pp. 525, 526)

Numerous Federal decisions are cited in said text in support of the above quotation. Rule 52a FRCP is to the same effect. See *Fleming* v. *Palmer,* 123 F.2d 749 (1941), cert. den. 316 U.S. 662; *U. S.* v. *Still,* (1941) 120 F.2d 876, cert. den. 314 U.S. 671; *U. S.* v. *E. I. Du Pont De Nemours*

& Co., (1956) 76 S. Ct. 994, 351 U.S. 377; *U. S.* v. *National Association of Real Estate Boards*, (1950) 70 S. Ct. 711, 339 U.S. 485; *Cedillo* v. *Standard Oil Co. of Texas*, (1961) 291 F.2d 246, cert. den. 368 U.S. 955.

The Texas rule is even stronger in support of findings of fact by the trial court. The Texas rule is that fact findings may embody inferences deducible from the evidence, and a finding will be sustained if it is based on any substantial competent evidence, 57 Tex. Jur. 2d 354. Numerous decisions are cited in support of this statement.

Article 2776a VACS pled by Polk in his challenge provides that:

> *"No person shall be elected as a trustee of a school district in this State unless he is a qualified voter."*

We submit that the conclusion of the trial court that Oser was not a qualified voter is amply supported by substantial and credible evidence as is the court's finding of fact that Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period between October 1, 1966 to January 31, 1967 and that he did not apply for registration as a voter during such period as required by the law.

ARGUMENT AND AUTHORITIES UNDER QUESTION II

The decision of *Koy* v. *Schneider*, 225 S.W. 188 (nwh, 1920), considered a controversy similar to this case. Appellant in that case brought a suit in the district court for mandamus against appellee as tax collector to compel him to receive from appellant the sum of $1.75 in payment for a poll tax and to require him to issue her a receipt therefor so she would be qualified to participate and vote in a Democratic Primary election. Appellee answered by gen-

eral pleas and also alleged the unconstitutionality of the act under which appellant claimed. The court held that the time in which the payment of the poll tax entitling plaintiff to vote expired, that all such elections involved had long since been held and it would be an idle and vain thing for the court to render a judgment compelling the tax collector to issue such a receipt. The court further held that the only judgment that could be entered would be to dismiss the appeal because the subject matter of the suit had ceased to exist, which was done.

This ruling is in line with the great weight of authority in Texas. For instance, in *Polk* v. *Davidson*, 196 S.W.2d 632 (Tex.), the Supreme Court of that state held that an election contest involving the Sheriff's office in Harris County had become moot and should be dismissed. A writ of mandamus was issued in that case directing that Davidson cease his contest. The judgment became effective immediately and the opinion stated that the court would not entertain any motion for rehearing. In that decision, the court said:

> "A case becomes moot 'when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.' Sterling v. Ferguson et al., 122 Tex. 122, 142, 53 S.W.2d 753, 761. As regards party primary nominations, the authorities recognize that one holding a certificate that he is the nominee is endowed with a valuable right which he may enforce, that is, the right to have his name printed on the official election ballot as such nominee until the certificate is set aside in a proper proceeding, such as an election contest; that voters as well as nominees holding certificates have a valuable right under the statutes of this state to have absentee ballots printed and available to them at the prescribed time; that, therefore, when the time comes that the

> issues cannot be heard and a final judgment entered adjudging the validity or invalidity of the nominee's certificate so that absentee ballots can be printed and available to voters as and when required by statute, the contest is moot and must be dismissed." (p. 634)

As is apparent from Smith's testimony hereinbefore mentioned, Oser was aware that his certificate was erroneous before the printing of the ballots for the run-off election. He took no action at that time to protect his alleged rights. The rule mentioned has long been recognized in Texas as is evident from the following quotation from 3 Tex. Jur. 2d 313:

> "Appellate courts will not decide moot or abstract propositions. In other words, the existence of an actual controversy is essential to an exercise of appellate jurisdiction. A case, issue, or proposition is, or becomes, moot or abstract when it does not, or ceases to, rest on any existing fact or right."

Numerous cases are cited in said text supporting the above quotation.

CONCLUSION

The fact situations considered in the cases cited by Petitioner as reasons for granting the writ do not exist here. Oser never did personally request the issuance of a registration certificate. He has not been unlawfully denied his right to vote. His wife, according to her testimony, made three inquiries about registering by telephone during the period extending from October 1, 1966 through January 31, 1967. Any married man can certify to the uncertainty of such conversations. As far as we have been able to ascertain, that is the first time any request for the issuance of a writ of certiorari has been presented to the Supreme Court of the United States based upon a wife's

telephoned inquiries. The findings of fact by the trial judge are amply supported by the evidence. The conclusions of law pronounced by him are in conformance with the great weight of authority. We request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Copies of the above and foregoing reply brief were mailed by Certified Mail to Raeburn Norris, 201 Scanlan Building, Houston, Texas, today, March ....., 1968, and also by regular mail, properly addressed, to Al Schulman, 505 Scanlan Building, Houston, Texas, James J. Hippard, 1023 Americana Building, Houston, Texas, and Ronald Cohen, 505 Scanlan Building, Houston, Texas, attorneys of record for Petitioner, on said date.

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